(2)

No. 90-263

In The

Supreme Court of the United States

October Term, 1990

DELORIS M. ADAMS and GRADY C. ADAMS,

Petitioners,

v.

LEISURE DYNAMICS, INC., and VISTA HOST, INC., a joint venture, d/b/a HOLIDAY INN NORTH,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court deprived Petitioners of their Seventh Amendment right to trial by jury by rendering summary judgment against Petitioners under Federal Rule of Civil Procedure 56 on the grounds that under Florida law there was no duty to protect Petitioner from the obvious presence of a table in a hotel lobby.

PARTIES TO PROCEEDING

Respondents concur with the statement of parties to this proceeding contained in the Petition for Writ of Certiorari.

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OPINIONS BELOW

Respondents concur with the statement of opinions below contained in the Petition for Writ of Certiorari.

JURISDICTION

The *per curiam* order of the Eleventh Circuit Court of Appeals was entered on April 19, 1990. Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1948).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 56, Summary Judgment, provides, in pertinent part:

> (c) *Motion and proceedings thereon*
>
> * * *
>
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
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> * * *
>
> (e) *Form of Affidavits; further testimony; defense required*
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> * * *
>
> When a motion for summary judgment is made and supported as provided in this rule, an

adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

The factual background of this case is, with two exceptions, adequately presented in the opinion of the United States Magistrate at pages 5-7. The magistrate was charged with responsibility for all pre-trial matters, including ruling upon Respondents' motion for summary judgment, pursuant to a stipulation between the parties. The first exception lies in the fact that there was no evidence that the Petitioner tripped over a table. The Petitioner did not know why she fell and there were no eyewitnesses. In stating that the Petitioner tripped on the table, the magistrate was apparently construing the evidence in the light most favorable to Petitioner as the nonmovant and drawing every favorable inference for the Petitioner. The second exception lies in the fact that the uncontroverted affidavit of Craig Gillespie stated that the table was open to ordinary observation and that there was room for Petitioner to walk to the registration desk without difficulty or danger and without coming into contact with the table.

ARGUMENT

Petitioners' right to trial by jury was not abridged by the magistrate's action in correctly rendering summary judgment against Petitioners under Florida law, and certiorari should not issue to allow Petitioners a second review of the claim that Respondents had a duty to protect her from a table.

Certiorari jurisdiction was not conferred on this Court in order that a twice-defeated party be afforded yet another hearing. *Magnum Import Company v. Coty,* 262 U.S. 159, 163 (1923). Rather, the Court's certiorari power was conferred to ensure uniformity of decision and to allow review of issues of "peculiar gravity." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,* 240 U.S. 251, ___, 36 S. Ct. 269, 271 (1916). This case presents the substantive question of whether Florida law imposed upon Respondents the duty of protecting the Petitioner from an innocuous piece of furniture in plain view. Such an issue does not merit the exercise of this Court's certiorari jurisdiction.

Certiorari should not issue when a trial court has expressly followed this Court's opinions on summary judgment procedure and the case is determined by state law and the trial court's judgment regarding a particular set of facts. This Court has traditionally not exercised its certiorari jurisdiction under such circumstances. *See Appalachian Power Co. v. American Institute of Certified Public Accountants,* 361 U.S. 82, ___, 80 S. Ct. 16, 18 (1959) (Brennan, J., as Circuit Justice). The magistrate correctly applied this Court's precedents regarding summary judgment in an unpublished decision that was itself affirmed

without opinion. The failure of the Court of Appeals to issue an opinion may be seen as an indicator of the frivolousness of the Petitioners' appeal. *Sumner v. Mata*, 449 U.S. 539, 548 (1981). Certainly, the lack of an opinion by the Circuit Court reflects that court's belief that an opinion would have no precedential value and that summary judgment was supported by the record. 11th Cir. R. 36-1.

While the Petitioners contend that the magistrate engaged in prohibited factual determinations, this was not the case. Under Petitioners' view, a trial judge cannot engage in any intellectual analysis of the facts of a case without running afoul of this Court's precedents regarding summary judgment procedure. To the contrary, this Court has consistently held that a trial judge *must* review all of the evidence of record and determine whether there is any evidence upon which a reasonable jury could return a verdict in favor of the non-movant in determining a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, the judge or magistrate is required to "view the evidence presented through the prism of the substantive evidentiary burden" of the non-movant. 477 U.S. at 254. The non-movant cannot defeat a properly supported motion for summary judgment without offering any significant, probative evidence in support of the complaint. *Id.*

The uncontroverted facts before the magistrate were that Petitioner fell in the lobby of Respondents' hotel, that there was an end table among other furniture in the lobby, that there was a plant on the table, and that the table was open to ordinary observation with sufficient room for Petitioner to pass without danger. Petitioner

could not say why she fell and there were no eyewitnesses. Petitioners did not provide any evidence to contradict these facts and relied instead upon reiteration of the allegations of their Complaint regarding supposed "congestion" of the lobby and the location of the table "in the most direct path" across the lobby. Petitioners continued this reiteration of unsubstantiated allegations in the Circuit Court and in their Petition for Certiorari.

Under Florida law, an owner of property is not an insurer of the safety of invitees and is not required to maintain the premises in such a manner that an accident could not possibly happen. *Night Racing Association v. Green*, 71 So. 2d 500 (Fla. 1954). The mere occurrence of an accident does not give rise to an inference of negligence and is not sufficient for a finding of negligence on the part of anyone. *Cassel v. Price*, 396 So. 2d 258, 264 (Fla. 1st DCA 1981). Liability on the part of a landowner for injuries allegedly stemming from a condition extant on the property can only be established if the alleged condition presented an unreasonable risk of harm to the plaintiff. *Id.*

The Florida Supreme Court has exempted from the category of conditions sufficient to impose liability on a landowner those conditions which are so commonplace that the possibility of their existence is known to all. *Casby v. Flint*, 520 So. 2d 281, 282 (Fla. 1988) (multiple floor levels in a dimly lit or overcrowded room). The magistrate determined that, as with differing floor levels, the existence of furniture in a hotel lobby is so commonplace that the possibility of its existence is known to everyone. Respondents were entitled to expect, as a matter of law, that Petitioner would perceive that which

would be obvious to her upon the ordinary use of her senses. *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 42 (S.D. Fla. 1986). The uncontroverted affidavit of Craig Gillespie, submitted by Respondents, showed that the table was in plain view with ample room for guests to pass without danger. The magistrate's statement that the table was "obvious" to Petitioner is merely a recitation of Gillespie's testimony, which was not contradicted by Petitioner.

Florida has adopted Section 343A of the *Restatement (Second) of Torts*, which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness.

Casby, 520 So.2d at 282; *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1312 (Fla. 1986). As the Florida Supreme Court stated in *Ashcroft:*

> In the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself.

492 So. 2d at 1311. If a condition of the premises creates an unreasonable risk of harm to the invitee *despite* the obvious nature of the condition, the landowner may be required to take additional steps to protect the invitee. *Id.* A table, however, does not present such an enhanced danger.

The rule of *Restatement* Section 343A allows a landowner to assume that invitees will not be harmed by obvious dangers that are not extreme and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. *Restatement (Second) of Torts*, Section 343A, comment g. Florida courts have refused to find the presence of "dangerous conditions" in various cases dealing with items vastly more hazardous than a table. These items include broken pieces of brick and concrete block left around the base of a tree and the needle-like thorns of a pygmy date palm. *See Cassel*, 396 So. 2d at 260 (brick and concrete block); *Meyer v. Torrey*, 452 So. 2d 672 (Fla. 2d DCA 1984) (pygmy date palm). In a recent case, a Florida District Court of Appeal held that a sidewalk curb was not sufficiently dangerous to impose liability upon the landowner when tripped upon by an invitee. *Aventura Mall Venture v. Olson*, 15 F.L.W. D759 (Fla. 3d DCA Mar. 20, 1990). In *Aventura*, the District Court of Appeal adopted the proposition that

> Some conditions are simply so open and obvious, that they can be held as a matter of law not to constitute a hidden dangerous condition.

Id. As a result, the magistrate was clearly correct in rendering summary judgment in Respondents' favor under the uncontroverted facts and the substantive law of the State of Florida. Petitioners' claim of deprivation of their Seventh Amendment right to trial by jury has no merit in a case such as this where summary judgment is correctly entered under prevailing federal procedure and local substantive law. *Pease v. Rathbun-Jones Engineering*

Co., 243 U.S. 273 (1916). As a result, the Petition for Writ of Certiorari should be denied.

CONCLUSION

This case does not involve any question of conflict between Courts of Appeal, nor does it raise any serious question involving the public interest. The Petition for Writ of Certiorari in this case is nothing more than a third attempt by the Petitioners to pursue a meritless claim. Furthermore, the United States Magistrate in rendering summary judgment conformed exactly with the procedural prerequisites set forth by this Court and Federal Rule of Civil Procedure 56. Under the uncontroverted facts the magistrate was compelled by Florida law to enter summary judgment in favor of Respondents. This was because under Florida law there was simply no duty to protect Petitioner from a piece of furniture situated in a hotel lobby.

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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